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**Case Management of Complex Fraud Trials: Actors and
Strategies in Achieving Procedural Efficiency**

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Case Management in Complex Fraud Trials: Actors and Strategies in Achieving Procedural Efficiency

Abstract

Trials of complex fraud cases have raised numerous contentious issues in terms of procedural fairness and public resources expenditure. This paper examines the management of complex fraud trials through the lens of managerialism in the criminal justice system, analysing its effects upon procedural efficiency of the trial. The paper draws on qualitative data gathered from observations of insider dealing trials, and interviews with prosecuting and defence lawyers and a trial judge. The findings reveal that, in practice, although dangers to procedural efficiency are constantly present throughout the trial, its successful management depends on a combination of factors vested in the actors involved and the strategies used. Whilst the increased efficiency of the trials is a reflection of managerial approaches in case management, this does not necessarily indicate a negative development in the area of the control of business misconduct, and managerialism may not be necessarily entirely undesirable in the criminal justice system.

* * *

Introduction

The purpose of this paper is to examine the movements towards managerialist practices in the criminal justice system in England and Wales in the context of the complex fraud trial, and their effects upon achieving procedural efficiency in such trials. I principally argue that managerialist practices have expanded in the complex fraud criminal process, prompted by the need to present the case to the jury in a manageable way, contributing to the development of pre-trial and trial strategies that promote efficiency. Whilst the increased efficiency of the trials is a reflection of managerial approaches in case management, this does not necessarily indicate an entirely negative development in the area of controlling complex and serious business misconduct – an area that historically has been fraught with challenges and difficulties.

On the basis of original empirical data gathered through observations of insider dealing and market manipulation criminal trials, and interviews with prosecuting barristers, defence solicitors and barristers, and a trial judge, I analyse the role of these different actors in the criminal trial, and the effects of their practices and strategies upon achieving procedural efficiency and the presentation of the case to the jury. Though more modestly, due to the limitations of the data, I also reflect on how the practices that the actors employ – in light of the demands of the Criminal Procedure Rules (CrimPR) and the complex fraud trials Protocol to increase efficiency in complex fraud trials – affect the basic postulates of the adversarial criminal justice system in England and Wales. The findings show that managerialist thinking limits adversarialism in some respects and co-exists with it in others.

The paper proceeds as follows: in Part I, I discuss the expanding trends towards a managerialist discourse and procedures in the criminal justice system overall, then specifically in the context of the complex fraud trial, relating these considerations to the challenges of trying complex fraud. I examine these issues in the context of the criminal process and the complex fraud trial since the criminal justice system is the locus of notable concerns regarding: public costs; the expansion of procedural management rules and the protection of the defendant's due process rights as the defendant might be especially vulnerable if cases are managed in a way that aids the prosecution. The significant demands to reduce costs in the criminal justice system in light of the financial crisis (Edwards, 2010; McEwan, 2011) particularly affect the costly complex fraud trials tried at the higher Crown Courts. Historically, the criminal processing of complex fraud has been fraught with procedural efficiency challenges, and managerialist considerations come to full fruition in this sphere of the criminal process.

Part II introduces the case study, the substantive criminal law regulation of insider dealing and market manipulation, and the designated prosecutor – the Financial Conduct Authority (FCA). The FCA is a hybrid financial regulator in the sense that it has express statutory discretion to instigate criminal action, in addition to regulatory or civil action against offenders. Drawing from the empirical data, in Part III I analyse the actors and strategies employed to achieve procedural efficiency, with a particular focus on the activist judge, the modes of cooperation (and conflict) between the prosecution and the defence teams, and the strategies of using technology and resources. This analysis adds to the literature as academics and participants attempt to understand how the requirements of the CrimPR and the changes they carry are implemented 'on the ground'.

Complex fraud trials, managerialism and procedural efficiency

In this section I trace the development and embeddedness of managerialist considerations in the regulation of the complex fraud trial. Managerialist approaches mean an adoption and emphasis on commercially derived ‘solutions’, performance measurements, and a set of values which “prioritize systemic integrity and the efficient control of internal system processes” (Brownlee, 1998: 325). In this trend, “the courts are recast as managers of a service and citizens are transformed into ‘clients’ and consumers of that service” (Brownlee, 1998: 324; also Lacey, 1994). The adoption of ‘managerialist talk’ and priorities in the organisation and regulation of the criminal court procedure has been associated with a growing application of neoliberal governmental considerations (Ward, 2015), new penology approaches in criminal justice (Brownlee, 1993; Freibert, 2005; Cheliotis, 2006; Hood, 1991; Raine & Wilson, 1995; Sanders et al., 2010), and concerns with saving costs. Even though scholars have subjected the prevalence of ‘new penology’ as the dominant criminal justice paradigm to substantive and well-founded criticism (see e.g., Cheliotis, 2006; O’Malley, 1992, 2001; Rigakos & Hadden, 2001), managerialist ideologies are still emphasised as having a significant impact on organizational practices (Cheliotis, 2006: 333). In fact, Brownlee (1998) claims that the pursuit of managerialist goals has had a greater impact on the criminal justice system in England and Wales than any other stated policy approach in Home Office papers.

The case management system embedded in the Criminal Procedure and Investigations Act (CPIA) 1996, and the Criminal Procedure Rules for England and Wales (CrimPR) is a prime example of these trends in the UK criminal court justice. Case

management specifically concerns the organisation of criminal cases pre-trial and at trial and “...aims to reduce the number of unnecessary hearings... late guilty pleas and the length of trials” (Darbyshire, 2014: 31). Case management procedures are aimed at reducing the levels of inefficiency, disorganisation and delay in the conduct of criminal trials (Jacobson et al., 2014). The CrimPR represent the most direct source of law on the conduct of criminal trials, and these have been introduced in 2005 on the model of Civil Procedure Rules, and following the Auld (2001) Review of the Criminal Courts of England and Wales. The complex fraud trial is governed by the general CrimPR and a further Protocol on the Control and Management of Heavy Fraud and Other Complex Criminal Cases (the Protocol). Some of the CrimPR and Protocol requirements exemplify managerial considerations, much along the lines of ‘new penology’ (Feeley & Simon, 1992), and these might be justified with the requirements to increase procedural efficiency – a significantly problematic issue in the context of complex (heavy) fraud.

Complex fraud is a vague term but, according to the Attorney General’s (2012) Guidelines for Prosecutors on Plea Discussions in Serious Fraud Cases, fraud may be serious or complex if at least two of the following factors are present: the obtained amount exceeded £500,000; the fraud was committed with specialised knowledge of financial or regulatory matters; there were numerous victims; a substantial fraud on a public body; there are widespread public concerns around the case, and endangerment of the economic well-being of the UK. Whilst complex frauds might have a significant impact and can cause serious harm (see e.g. Levi & Burrows, 2008), their criminal justice processing has historically faced severe challenges. There are often procedural difficulties in the conduct of the trials: they can be especially long, often lasting for months on end; the evidence is heavily documents-based, and issues of

dishonesty concern technical business regulations that are often difficult, or tedious, to present to lay jurors (Levi, 1993a; Lloyd-Bostock, 2007; Wooler, 2006). Further complications arise from the fact that complex fraud offences commonly involve multiple defendants and charges, thus affecting the presentation of the case, the length of the trial and the ability of court officers to manage it. Much serious and complex crime is simply not prosecuted because of these presentational problems (Levi, 2013). The trials are also particularly costly and this problematises considerations of effective public expenditure and the public utility of bringing a high-profile fraud case with uncertain outcomes, especially in light of the governmental cuts to state-funded public prosecutors (McEwan, 2011).

Criticisms of how complex fraud trials are conducted especially come to the fore after spectacular collapses of high-profile cases such as the Jubilee Line and the Wickes cases, and some recent Serious Fraud Office investigations (e.g. the Tchenguiz brothers and the Kaupthing bank collapse). One of the most serious criticisms has been that some trials (Jubilee Line and Wickes) had collapsed due to jury malfunctions (Bowers & Wrey, 2003). This has spurred calls for serious fraud cases to be tried without a jury, though there has been very little empirical support that the “declining quality of the jury” (Levi, 1993a) is the most significant factor in the collapse of fraud trials (see Lloyd-Bostock [2007] on the Jubilee line trial; also Julian, 2008), or that lay jurors are unable to understand complex business transactions (Honess et al, 2004). Other factors, such as prosecutorial inadequacies in presentation and oral advocacy (Levi, 1993a; Wooler, 2006) might be more important but these claims have also not been supported by empirical insights. The debate around this

issue is long-standing, with occasional proposals for judge-only trials in complex fraud cases, but without, as of yet, political support to follow through such proposals.¹

The CrimPR and the specific Protocol aim to mitigate some of these challenges. The goal is to save ‘court time and costs’ with more attention to pre-trial case management and hearings, which means dealing with as many procedural issues as possible in private before the case is publicly displayed to the jury. Managerialist considerations are visible in the requirements of an active judge, who must “have a much more detailed grasp of the case than may be necessary for many other Plea and Case Management Hearings (PCMHs)”, establishment of the (un)disputed issues pre-trial, arrangement of the structure and timetabling of the trial (Rule 3.10 CrimPR), and the agreed facts and admissions. There is an overriding common law power for the judge to manage the court and the case,² and a statutory duty to further the objectives of the CrimPR. Importantly, the extent of judicial interventions into the manageability of the trial involves activities around the scope of the indictment, such as ‘pruning’ (persuading the prosecution that it is not worthwhile pursuing certain charges and/or certain defendants), or severing the indictment. Prosecutorial objections of weakening their case may affect the ability to sever the indictment (Rule 1.1 (2)(g) CrimPR).

Issues of procedural efficiency have also guided the development of a “participatory criminal justice model” (Redmayne, 1997) where the CrimPR and Protocol require the parties to contribute to the efficient management of the trial, notably through the disclosure regime.³ The requirements on the defence concern providing a Defence

¹ See e.g. Criminal Justice Act 2003 (‘jury waiver’); Law Commission 2002; Fraud Bill 2007.

² Chaaban [2003] EWCA 1012.

³ Section 5(1) CPIA.

Statement at the PCMH with an outline of its defence and a list of expert witnesses⁴ which may be frequently called in complex fraud trials. Disclosure is an on-going process since the Defence Statement can trigger secondary prosecution disclosure of materials helpful to the defence. There are requirements of dealing with all relevant disclosure issues pre-trial, and this means that any disputes around which documents should be provided are resolved pre-trial.

The introduction of the CrimPR and the case management provisions has been a subject of much debate, and criticisms of the system run along two lines: one of practicality and implementation; the second of criminal values. The ability of the CrimPR to contribute to timely, streamlined and disciplined trials depends significantly on the attitudes and practices of the trial actors. Judges need to shift from “neutral, passive umpires of adversarial theory into becoming active managers” (Garland & McEwan, 2011: 235; Denyer, 2010); prosecutors and defence barristers need to shift from combativeness (Langbein, 2003) to a cooperative culture (McEwan, 2000; Garland & McEwan, 2011). Commentators have indicated that such shifts are difficult to achieve, especially with respect to the parties of the process (Quirk, 2006). Prosecutors and defence barristers alike are still immersed in the long-standing adversarial tradition, resources are scarce on both sides with regard to the onerous disclosure process, and there are no effective sanctions for reprimanding participants who impair the procedural efficiency of the trial (McEwan, 2011; Redmayne, 2003).

Scholars have suggested that heavy reliance on cooperative attitudes by the sides to the process may endanger the basic postulates of adversarialism in the criminal justice

⁴ Defence statements are limited by Article 6 ECHR.

system of England and Wales (Hodgson, 2010; McEwan, 2011; Garland & McEwan, 2012). At its root is the notion of party rather than judicial control over the case, and the process relies on the “lawyer-partisans responsibility for gathering, selecting, presenting, and probing the evidence” (Langbein, 2003: 2). Inevitably, the party control over the case and their engagement with presenting its case to the jury and discrediting the other’s case elicits adversarial or combative tactics.

These basic postulates of adversarialism may be eroded by the CrimPR, and in the context of the complex fraud trial by the Protocol. First, the pursuit of managerialist goals can affect the ability of the prosecutors to direct the outcome of the case and “to bring a criminal to account, with a negative effect on crime control” (McEwan, 2011: 524). Case management affects prosecution success in the sense that the management and the presentation of the case are connected: the need to manage the length of trials might have an impact on reducing the number of charges and this affects the appropriate presentation of the real extent of the crime (Samuels, 2004). Judicial involvement in activities such as pruning the indictment may effectively diminish the ability of prosecutors to prove their case because of a fragmented portrayal of complex business transgressions. Second, managerialism may significantly prejudice the defence position through demands for defence disclosure and limits on the presentation of the evidence. Commentators have argued that this is a worrying trend since it ultimately requires the defendant to assist the prosecution with its case against him/her (Leng, 1995; Owusu-Bempah, 2003; Redmayne, 2003; Quirk, 2006). The requirements of cooperation in the pre-trial process may also prevent the defence from launching adversarial tactics designed to offer protection and a fair trial (McEwan, 2011), weakening the defendant’s rights. Finally, the lack of defence resources and appropriate representation might mean an inability to abide by the

disclosure requirements thus leading to significant extra delays, costs and inefficiencies (Zander in RCCJ, 1993).

While there is an awareness of the procedural difficulties, there is little empirical evidence on the internal dynamics of the criminal courtroom in serious fraud trials, how such trials are managed in practice, the effectiveness of the procedural rules in this area, the informal practices which may have developed around their implementation and the interplay between managerialism, procedural efficiency and case outcomes. It is important to uncover the heavy fraud “court community” (Flemming et al., 1992) since the formal boundaries and informal meanings of “the law” in practice as well as case outcomes are shaped in the complex interrelationships between the interested parties (Roach Anleu & Mack, 2010): the trial judge, the prosecution and the defence. Other studies have adopted similar approaches in the examination of the relationships that exist between the various court actors in the magistrate’s (Carlen [1976]; Herbert [2004]; McBarnet [1981], and Crown Courts (Cammiss [2006], Darbyshire [2011]; Moore [2003], and Rock [1993]) but not in the context of the complex fraud trial. Two recent studies examined judicial (Darbyshire, 2014) and other professionals’ perspectives (Jacobsen et al., 2015) on case management in Crown Courts, yet these studies do not focus on the particularities of procedural efficiency threats and management in the trials of serious economic offences.

I am to address this gap by providing a much closer inspection of the “minutia” (Rock, 1993) of the heavy fraud pre-trial and trial legal process of insider dealing and market manipulation in practice. In the next section I introduce the offences of the

case study, and the prosecuting actor – the Financial Conduct Authority (formerly, the Financial Services Authority), and then discuss the methodology of the study.

Introducing the offence and the prosecutor: insider dealing, market manipulation and the Financial Conduct Authority (FCA)

Insider dealing represents the quintessential white-collar offence – in the manner referred to by Sutherland (1983) as a crime of persons of respectable status, committed in the course of their career. It represents a particular type of securities fraud, consisted of trading on inside information that distorts the cleanliness of the market by allowing unfair advantage for the trader in contrast to other market participants who do not possess the information. Insider dealing is one of the rare white-collar crimes that has received more sustained attention by criminologists (Reichman, 1993; Shapiro, 1984; Williams, 2012). The UK insider dealing regime has also attracted both academic analysis (Barnes, 2011; Rider, 2008; Wilson & Wilson, 2014) and practitioners' insights (notably Clarke, 2013).

Insider dealing is prohibited under section 52 of the Criminal Justice Act 1993 as dealing on price-affected securities using inside information. Such *actus reus* means that it is a highly technical offence where the following need to be established: the existence of 'inside' information not in the public domain; access to such information; the trading activity (commonly undisputed), and the fact that the securities were price-affected, i.e. sensitive to public take-over announcements. The *mens rea* consists of knowledge that the information was 'inside', making it vague whether dishonesty is an element of the offence as is the case in other core fraud offences.

Market manipulation was introduced under section 397 of the Financial Services and Markets Act (2000) as the offence of making misleading statements⁵ to the market to the effect that other market participants are induced to enter or refrain from a certain business transaction (for example, investing in the stock of a company on the basis that the investors believe that its annual reports show profit). This offence is also highly technical as causality must be shown between a misleading statement and subsequent investor behaviour. The offence's *mens rea* elements of knowledge of misleading statements and dishonesty are also difficult to prove.

In England and Wales, insider dealing and market manipulation offences are exclusively prosecuted by the Financial Conduct Authority (FCA), the regulatory agency entrusted with the regulation and supervision of the UK financial markets. The Financial Services and Markets Act 2000 gives express criminal prosecution powers to the FCA for insider dealing (section 402) and for market manipulation (section 401). The predecessor of the FCA, the Financial Services Authority (FSA), pursued and won its first criminal prosecution for insider dealing in 2009.⁶ Until then, the FSA pursued its statutory objective of tackling insider dealing solely through the market abuse civil regime. Criminal prosecutions have now become an integral part of the regulator's enforcement strategy. As of 15 October 2016, the FSA/FCA has undertaken 34 prosecutions, securing 30 convictions, and one person has been charged. This indicates a considerable success rate for the regulator. In addition, the FCA has been continuously developing its criminal powers with innovations in their usage and extent. For example, in *R v Anjam Ahmad* [2010] (unreported), the FSA entered into a Serious and Organised Crimes Prosecution Act (SOCPA) 2005

⁵ The Financial Services Act (FSA) 2012 repealed the market manipulation offence. Sections 89 and 90 FSA replace the now repealed offence.

⁶ *R v McQuoid & Melbourne* [2009] 4 All ER 388.

cooperation agreement, meaning that the defendant (insider) received a suspended prison sentence for testifying against the trader.

Finally, since *McQuoid*, a relatively simple case that did not involve financial services professionals, recent prosecutions demonstrate a commitment to pursue more complex and technologically sophisticated cases, and cases involving senior City practitioners. For example, the first extended insider dealing ring charged was the case of *R v Mustafa & others* [2012] (unreported) in which the FSA achieved six convictions. A further, more prominent case with international elements was *R v Sanders & others* [2012] (unreported) in which the FSA cooperated with the US Securities and Exchange Commission and the Department of Justice to prosecute an insider dealing network in which the insider was US-based and the traders were UK-based. The FCA's highest profile and most costly case (£20m) is *Tabernula*, a joint operation between the FCA and the National Crime Agency, where the FCA secured three guilty pleas and two convictions. All of these cases indicate the FSA/FCA's resolve to expand resources on complex cases, and, coupled with the specialised knowledge on financial markets, have contributed to the notions of the FCA as a sole proprietor in insider dealing prosecutions.

Its cases commonly satisfy the Attorney General's definition of complex fraud: the amount obtained commonly exceeds £500,000 (e.g. *Operation Tabernula*); there could be a significant international dimension (e.g. *R v Sanders*); the offence requires specialised financial knowledge, and the misconduct undermines confidence in financial markets. The outlined problems of the successful management of complex fraud trials can also commonly threaten insider dealing and market manipulation cases. For this reason, criminal trials of insider dealing offer a fertile setting for

examining how procedural efficiency is (not) achieved in a complex fraud trial, the role of different actors in the process, and the employed strategies.

In the next section I discuss the research methods used in the empirical study.

Methodology

The methodology of the project involved gathering primary empirical data on the operation of the CrimPR and the Protocol in practice. This involved a combination of complementary qualitative research techniques: interviews and observations of criminal trials. The use of different methods would strengthen the validity of the data, expand the range of perspectives and improve interpretation of the data.

With regard to the sampling of the interviewees, qualitative studies frequently employ non-probability sampling techniques as they are driven by the need to explore an issue or develop a theory and not by concerns of ‘representativeness’ (Miles & Huberman, 2014: 27-29). Through purposive sampling, the respondents were selected due to their unique position as participants in criminal court proceedings. The informants selected were considered to be: knowledgeable about the experience of financial regulation enforcement; willing to talk (not under organisational constraints not to talk with ‘outsiders’), and representative of the range of points of view. These approaches yielded a pool of respondents from: FSA/FCA enforcement staff (4); prosecuting barristers (3); defence barristers and solicitors (9); and a trial judge (1).

Despite their rarity, I was able to observe four criminal trials in which the case was submitted to jury decision-making (three trials of insider dealing and one of market manipulation), and one trial of insider dealing in which the defendants pleaded guilty after the pre-trial case management hearing but two weeks before the case was due to

be heard before the jury. All of the trials took place at the same Crown Court, two of them in 2012, and three in 2013. The trials had varying lengths but all of them took place over the course of several weeks and were concluded within the three-month period recommended by the Protocol. There were seven convictions and three non-guilty verdicts, and one of the trials resulted in a mistrial due to a disclosure error on the part of the prosecution. Due to issues of anonymity I cannot state whether the participants I interviewed were involved in the trials I observed.

Achieving Procedural Efficiency: Actors and Strategies

Threats to procedural efficiency are constantly present throughout the insider dealing trials. Yet their efficient management depends on a combination of factors vested in the actors involved and the strategies used. Within the strategies, prominent place takes an activist⁷ approach by the judge, the modes of cooperation (or conflict) between the parties, the use of technology in the courtroom, and the use of resources.

The activist judge

The active involvement of the judge across both the pre-trial and trial period is crucial for the management and procedural efficiency of insider dealing trials. This is in line with the Protocol, and the overall CrimPR (and Civil Procedure Rules) movement towards increased judicial control over the conduct of trials. The considerations of procedural efficiency appeared as embedded in the heavy fraud “courtroom” (Flemming et al., 1992) and stem from the court’s culture. Informants reported that there was an established “no longer than three months’ trial policy” at the Crown Court where I observed the trials, driven by considerations of the toll upon the jurors’

⁷ The term ‘activist’ is borrowed from McEwan (2011) who discusses activism in the criminal justice system upon the model suggested by Mirjan Damaška (also Redmayne, 1997).

time. This is in line with Darbyshire (2014)'s finding on Crown Courts' case management approaches and efficiency in her study, and comparatively, also with research on US courts (Ostrom & Hanson, 1999).

This Crown Court is frequently responsible for deciding complex economic crimes cases, and its judges are to various extents specialised in trying them: these features may, in the present case, contribute to such a culture. The organisational ethos (Rock, 1993) of the court may thus serve as a conduit for the shared culture of activism and outlook towards efficient management of complex trials. This was supported, for example, by the fact that in some cases non-resident judges were brought in and yet they also abided by the "no longer than three months' trial policy" of the Crown Court.

Driven by the "no longer than three months' trial" key performance indicator (Freibert, 2005), the judicial activism in the pre-trial period involves managing the extent of the indictment, managing the disclosure regime and refining the timetable.

The FCA's strategic decision-making on what kinds of cases out of the numerous detected instances of market abuse to criminally prosecute within a limited budget is guided by considerations of 'best value for money'. This means that, though not numerous, the criminal cases of insider dealing involve more complex criminal scenarios in which there are multiple defendants (commonly one insider, but multiple traders) and multiple transactions on 'inside' information, rather than a single transaction between two parties.

At trial, this creates the problem of an indictment that involves multiple defendants, multiple charges and trading upon multiple stock lines as the basis of the charges.

Limiting the extent of the indictment is therefore a crucial judicial activity, and one that commonly involves the technique of ‘pruning’ the indictment. This has been suggested as a good practice in sections 2.vi and 4.vi of the Protocol, and in the context of insider dealing trials, the pruning consists of limiting the number of stock lines and excluding some of the stocks put forward by the prosecution as the basis of their case. Insider traders commonly trade improperly in a number of stocks, and this means that each of those trades could represent a separate offence and could be tried on its own merits. Yet this also elicits significant amounts of material that must be presented to the jury. Thus the restriction of the presentable stock lines is a key activity in insider dealing trials:

Judge#01: With Defendant X, I limited the number of stock lines that the prosecution could present to six, I think they were 21 or 23. If we had dealt with all of them we would still be doing the case now, it’s impossible. The key case management issue is to restrict the prosecution to their best six tradings.

This focus on the number ‘six’ seems to arise from the judge’s experience in managing insider dealing trials and perceptions of what the jury is able to digest since there was no other particular explanation why the number should be set to ‘six’. The pruning activities are therefore based on “performance measurements and values” to achieve efficient internal system processes (Brownlee, 1998: 325), but the balance of what is to be omitted still falls between considerations of the jury’s ability to focus, and the boundaries of a ‘winnable’ case for the prosecution.

Managing the extent of the disclosure is a further key judicial activity in the pre-trial period since the judge rules upon any contentious issues that may arise regarding the demands from the prosecution and the defence. I discuss the combative aspects of the potentially vast disclosure regime in the following section, but it is important to note

here that disclosure is also managed through the judge encouraging cooperation between the prosecution and defence teams. For efficiency reasons, in some cases the judge may decide to limit the length of a disclosure hearing and ask the parties to resolve disclosure issues in mutual communication and not through usurping court time.

Finally, the pre-trial judicial activism is fully evidenced in maintaining the timetabling of the trial activities. The timetable is provided by the parties and it is drafted to detailed considerations; even the cross-examination time is limited to a specific number of minutes. The senior judiciary encourages the practice of requesting complete timetables before the trial begins, and this practice is fully embraced in the insider dealing courtroom. The active role of the judge is further evidenced through establishing the list of witnesses so that there are no surprises at trial (again, a consideration connected to disclosure and preventing “ambush defences” [see x]), as well as the amount of time that the prosecution and defence will wish to spend in cross-examination. In this sense, the adversarial activities are agreed upon before the trial but they are not extinguished at the expense of cooperative timetabling.

The judge also manages procedural efficiency during the trial through several techniques: in the experience of the informants, these were making it difficult for new evidence to be introduced at the trial, reprimands for timetabling surprises or overflows, and providing appropriate guidance on the evidence presentation schedule, directions and summing up of the case.

There is a particular sensitivity in the insider dealing courtroom to any disruptions to the established timetable and the smooth progression of the case. The judge strictly enforces the agreed timetable, and unscheduled overflows are later disallowed or discontinued at trial. This has a further practical consequence of limiting the overall time spent in cross-examination. The sanctions for this are informal, similar to what Darbyshire (2014, see also Darbyshire, 2011: 196-197; Garland & McEwan, 2012: 248-250) has found in the majority of Crown Courts that she observed, and consist of reprimands:

Judge#01: If anyone starts falling out of line or starts to look as if they're trying to derail the trial, then I come down on them like a ton of bricks. We can timetable the amount of time of their cross-examination, you've got 2 hours to cross-examine this witness and that's it, the guillotine will come down.

In light of the difficulties in enforcing sanctions for poor case management, informal sanctions might take the place of formal reprimands that have thus far proven to be ineffective (Redmayne, 1997; Denyer, 2008, 2010). Importantly, the reprimands are addressed to all actors in the courtroom. In one trial, some court time was lost one morning because of a juror arriving late to the hearing. By coincidence, a reporter for a specialised legal website happened to attend this hearing and had subsequently written a scathing commentary on the loss of public money due to court delay times. The judge was particularly sensitive to this negative publicity and reprimanded the jury, reminding them of the need for responsible arrival at hearings.

Finally, the judge's ability to guide the schedule of the presentation of evidence, sum up the case effectively and provide tight directions to the jury significantly facilitates efficient closure of insider dealing trials. One of the criticisms of complex fraud trials

has concerned the long judicial summing up of the case that further prolonged jury time, and on occasion confused jurors as to the evidence heard earlier (Levi, 1993b). In insider dealing cases, this problem is significantly mitigated by judicial considerations of *presentation* of the case to the jury, and this guides the evidence presentation schedule, the subsequent summing up and the directions given. Specifically, the evidence presentation schedule is tailored to cater for the jury's understanding of the business transactions so they can get a "really simple picture", and it follows six stages: (1) an expert witness and occasionally a bank witness on what is happening in terms of the merger/takeover; (2) identification and presentation to the jury of the key documents and the price-sensitive information; (3) identification of the duration of the price-sensitivity; (4) technical expertise on how the insider dealers obtained the document, if this was done through a phone contact, identification of the telephone contact either within the bank or wherever it happens to be; (5) identification of the actual trading and the proximity between the access to the inside information and the trading. The trading is commonly presented in a large comprehensive and complicated document, made available to the jury; (6) identification of the publicly available information, and any evidence towards available defences. Depending on the defence's strategy, the defendant may be called as a witness especially with regard to stages (5) and (6) where the defendant can testify to his/her trading practices (e.g. that he/she commonly trades in such a manner) or to ways in which he/she gained access to the information relevant for the trading (e.g. that he/she made the trading decision upon consulting a variety of other publicly available sources and trading strategy calculations). In practice, the six stages can be followed by a seventh which involves calling and putting to stand character witnesses for the defendant, and these are always called last.

The procedural efficiency of the complex fraud trial is fostered by a judicial activism in encouraging limited indictments and an increasing oversight of timetabling and the presentation of evidence. The commitment to interventionism and the preparedness to use adverse comments to sanction parties (Redmayne, 1997) further contributes to the effectiveness of pre-trial hearings and the overall complex fraud criminal process. At least in the sphere of complex fraud trials, judges seem to embrace this CrimPR-supported cultural shift of their role in criminal litigation.

However, the judicial interventionism according to the CrimPR and Protocol demands also means that control over the case has been effectively shifted more towards the judge. The findings show that judges approach complex fraud trials with significant knowledge of the case, relinquishing their traditionally passive role of a “neutral umpire”. The judicial activism in the pre-trial period therefore limits the adversarial prerogative of the lawyer-partisans to select and present the evidence for their case, though in some respects, judicial managerial practices may also aid the trial participants. The pruning of the indictment may aid the crime control function of the prosecution through enabling a more manageable presentation of the case, and in this respect managerial considerations do not infringe upon the ability of the prosecution to bring offenders to just deserts. The same practices also aid the defence in the sense that defendants are not subjected to numerous charges (some of which may not be as evidentially supported) that require longer trials and longer jury deliberations, yet make no significant difference to the level of punishment. In the sphere of common crime, such judicial decision-making has commonly concerned pruning the indictment as to, for example, dropping lesser charges of assault in view

of an aggravated assault charge.⁸ In the present research, whether the defendant would be found guilty of trading in six or more stocks (charges) does not have a direct correlation with the level of punishment (e.g. more years in prison) (Barrister#02), but could prolong the time spent in court.

Modes of cooperation (and conflict) between the prosecution and the defence teams

The second category of actors whose participation is crucial for the successful management of the trial are the prosecution and defence teams, and the modes of cooperation (or conflict) that develop between them significantly facilitate the trial's procedural efficiency. There is commonly cooperation and good lines of communication between the prosecution and defence counsel and with the judge in fulfilling the case management demands. This is an important finding since the implementation of the CrimPR in a way that facilitates procedural efficiency heavily depends on the development of a culture of cooperation between the adversary parties (McEwan, 2000), and the movement away from professional socialisation into an adversarial working culture and practices.

Such culture has developed in the insider dealing courtroom, influenced by legal and extra-legal factors. The legal factors that facilitate a cooperative disposition concern the long-standing history of obligations of more active involvement of counsel in the pre-trial management of complex fraud trials (commencing with the CJ Act 1985), reinforced now by the specific CrimPR and Protocol demands. The extra-legal, and in some ways more instrumental, factor for the good lines of communication is the professional profile of the lawyers involved in these proceedings. According to one

⁸ I am grateful to X for this observation.

informant, “you usually get really good barristers, they are very experienced, normally you can rely upon them to get the case finished within the time.”

High quality and experienced barristers are retained on both sides of the process. Queen’s Counsels (QCs), senior barristers with an outstanding ability and expertise commonly appear on the prosecution side. The appearance of private QCs on the prosecution side is an important difference to other criminal trials where only Crown Prosecution Service (CPS) lawyers appear. This aids the case management process as the CPS have been found to frustrate the management activities in some courts (Darbyshire, 2014) due to significant non-compliance with the disclosure requirements (Edwards, 2010; Garland & McEwan, 2012: 239-242).

On the defence side, QCs from top chambers and solicitors from top ‘boutique’ criminal law firms also commonly appear. As might commonly be the case in the social control of white-collar offenders (see e.g. Mann, 1985), wealthy defendants in insider dealing trials are able to afford sophisticated lawyers. Solicitors from ‘boutique’ criminal law firms are crucial during the stage of the investigation to protect against self-incrimination in police interviews (defendants are commonly advised to say ‘no comment’ to the questions but to read out a prepared statement), and, importantly, have the resources to carry out parallel investigations that could aid the defence case – a resource unlike what is commonly available for defence teams on many Crown Court cases (Edwards, 2010).

The relatively small pool of top lawyers who specialise in the prosecution and defence of serious economic crimes also means that the insider dealing courtroom is

frequently populated by ‘repeat players’ (Galanter, 1974) with well-established professional lines of communication:

Barrister#01: I think it’s essential if you can create a culture of good email communication before the trial. On the whole in these types of cases, the type of people that tend to get instructed in this kind of work will be sensible.

The cooperation, therefore, between the prosecution and defence teams and with the trial judge prevails in front and outside of the jury purview, ultimately, aiding the efficient management of the trial. However the findings show that in some respects cooperation co-exists alongside conflict and tensions between the prosecution and defence counsels in the pre-trial period, notably with regard to the management of the disclosure regime and the presentation of evidence.

Disclosure

Disclosure is an immense and labour-intensive undertaking in insider dealing cases since these are heavily document-based, and different interpretations of the documents may crucially underpin the defendant’s (dis)honesty. Disclosure considerations are at the forefront of the prosecution thinking even as early as the purely investigation stage (Justice, 2016). Unlike the common problems that exist when the CPS acquires material from the police (Redmayne, 2003), the internal control over the gathering of evidence and the involvement of in-house lawyers and external counsel pre-charge means that disclosure issues can be dealt with in a way that hardens launching later applications for inadequate disclosure. After committal, resources are often expended on having a specifically designated disclosure barrister (commonly a junior lawyer), and a disclosure officer that is entrusted with liaising on disclosure issues with the defence. In some respects, therefore, the FCA prosecutors

have developed an ethos in which they are able to fulfil the case management responsibilities through putting themselves in the role of the defence (criticised by Quirk [2006] as an impossibility in the implementation of the disclosure rules). This facilitates the truth-finding process since regarding the gathering of evidence and disclosure “as an unnecessary distraction” can hardly be in the interest of the pursuit of justice (McEwan, 2011: 540), due process rights and just deserts.

Interestingly, the primary prosecution disclosure may aid both the prosecution and the defence case. According to this prosecutor, the requirements of primary disclosure could benefit the prosecution by curtailing the ability of the defence team to launch complicated defence strategies, and contribute to a more successful presentation of the case to the jury:

Barrister#02: If you are defending, you want to make it as complicated as possible. The prosecution have to be quite proactive about deciding how the case is going to be presented, and producing whatever material they decide the jury needs, and then saying to the defence this is what we are doing. If you do it like that, then the defence are much less likely to complain and cause trouble.

The prosecution gathering of evidence and pre-trial disclosure can also significantly support the defence position, mostly because the defence may lack statutory powers or resources for a comparable investigation. In one of the trials, the prosecution sought to rely on some tapes of conversations with instructions on executing trades to show that trading occurred on inside information. The defence obtained the same tapes as part of the disclosure process, and relied on the same conversations to show lack of knowledge of an ‘insider’ by the defendant. In other cases, individual defendants can obtain relevant company documents for constructing the defence only

after the FCA has obtained and, on occasion – as is the case with trading patterns – has mined the data into a presentable form.

Tensions may arise, however, as to the extent of the prosecution disclosure, and the number of Section 8 CPIA 1996 applications by the defence testify to this. On the defence side, resources are commonly employed to dispute the extent of the prosecution's disclosure, and to argue that further documents should be provided. Section 8 CPIA 1996 are commonly submitted to the court to decide on an order requiring the prosecutor to disclose further documents or electronic evidence. Contentious activities concerning disclosure are also employed by the prosecution, notably, to limit the “traditional defence wrecking device” in which disclosure claims are made of material that the prosecution is not actively using but which would require significant amounts of time and resources to process.⁹ The means of dealing with this involve disclosure of documents by class:

Barrister#01: Unused material can be a big problem. There is a way around this. A lot of it can be done by protocol, you disclose by class: ‘this body of evidence exists, at the moment we’re not prepared to look at it but you can’t justify why we should’. The Court of Appeal is very keen to back this approach, providing that the methodology you use is transparent. It’s quite possible to control that.

This device, and the previously stated “defence state of mind” by the FCA in gathering and assessing evidence makes it harder for the defence to challenge the extent of disclosure extent. According to one defending barrister:

Barrister#04: They instruct very good counsel, but it’s the thoroughness with which they are able to investigate. Very often when

⁹ R v Ward [1993] 1 WLR 619.

one's defending serious fraud there are arguments which can be had over disclosure and the adequacy of disclosure, but those arguments it's very difficult with the FCA because they do an absolute Rolls Royce service on the cases which they bring.

On occasion, contentious practices are prompted by the defence disclosure. In insider dealing trials, the Defence Statements commonly contain an exposition of the statutory defences on which the defence will rely as well as a section on the "Legal Arguments". In one case I observed, the defence disclosed that it sought to rely on certain statutory defences contained in sections 53(1)(b)-(c) of the CJA 1993. This effectively revealed the defence strategy – to negate the extent of knowledge of the defendant of the public information – and led to a conflict of legal arguments regarding who should discharge the legal, not just the evidential, burden of proof. The solicitors for the defence informed the prosecution by letter that they did not accept there was a legal burden on their clients. The prosecution in response sought a Preparatory Hearing for resolution of the issue, and the legal argument was resolved pre-trial, thus saving court time before the jury. This is a prime example of managerial considerations aiding trial efficiency through the involvement of the trial judge as an arbiter.

Yet the position of the defendant is jeopardised in these proceedings since the prosecution can then move to refute the defences through collecting additional evidence. Commentators have rightly argued that such efficiency expectations undermine the basic protections by the adversarial system (Owusu-Bempah, 2013) as defendants may be put in a position to assist the prosecution with the information they provide. Insider dealing trials are not exempt from these demands. However, in this particular case, the defence had been careful to not provide specific details on how

this would be proven (on the balance of probabilities), yet the required lists of witnesses may give the prosecution some indication. It is also important to contextualise the proceedings with respect to the particular offence: there is a limited number of statutory defences provided in the CJA 1993; thus the prosecution is placed in a position to expect a defence along any of those lines and this might diminish the importance of the defence disclosure for prepared prosecutors.

Presentation of evidence

Managerialist considerations, cooperation and tensions also occur around the evidence that will be presented at the trial. For prosecutors, concerns of trial manageability and presentation of evidence might guide the decision-making around the extent of the indictment even before the active involvement of the trial judge. The decision-making contains discussions of establishing the limits of the charges, and this is similar to the stock line considerations discussed above, along the lines of “the tighter the legal case, the better” (Barrister#03). The second strand of decision-making which also affects procedural efficiency concerns establishing limits of the number of indicted offenders or who to ‘put in the dock’:

Barrister#02: There is [*sic*] always people around the peripheries who have done wrong of one sort or another, but that doesn’t necessarily mean that you want them in the dock. In the Defendant Y case, there were a few other associates of the defendants, who quite plainly had some information and had traded on it, but you have got to draw the line somewhere. Then if you do prosecute him, you have to say to the jury he was the insider. If the jury aren’t sure that he was the insider, they both walk. It is a tactical decision as much as an evidential decision.

The prosecution's crime control function is therefore in some respects facilitated by these tactical decisions on presenting a manageable case and winning in court as a performance indicator (Freiberg, 2005) yet weakened in others: such considerations will inevitably result in some offenders not receiving their just deserts, as the 'cut-off line' needs to be drawn somewhere.

The pre-trial activist role of the judge in limiting the amount of material that will be presented at the trial through pruning the indictment is occasionally accompanied by an activist role by the defence in arguing that additional proper trading and stock lines should be presented to the jury.

This means that the presentation of additional trading in which there is no criticism as to impropriety is used as evidence for establishing perceptions of a common trading strategy that would undermine the prosecutorial allegations of dishonest trading. However, this creates problems of managing the court-time material, and judges need to balance the demands from both sides carefully. The fact that such concessions were subsequently allowed at the trial might mean that managerial considerations do not infringe the adversarial process, and in fact, might facilitate it:

Judge#01: Tensions that might arise. The problem that it creates is if the defence will say 'I was trading honestly, in stocks x, y and z', they will tend to bring up stocks x, y and z to say I was doing no different with what you got on the indictment. So you got a real problem in limiting the amount of material.

The managerial requests for, and practices of, cooperation between the prosecution and defence crucially contribute to the effective management of complex fraud trials. Yet the demands for such cooperation through defence disclosure may significantly

prejudice the defendant, especially if the defence has limited access to defence investigation resources.

The findings also show that in some respects cooperation and contentiousness may co-exist during the criminal trial, despite managerial requests for efficiency. Managerial inputs do not necessarily preclude the ability to launch more adversarial practices though the extent of adversarialism may be more attached to the exercise of certain procedural rights, rather than others. There are frequent tensions around the presentation of evidence where the two sides have a similar strategy to support their case: requests to present evidence of trading on multiple stock lines on the indictment or in the defence statement. Finally, the submission of Section 8 CPIA 1996 applications may be one of the most prominent aspects of contention in the pre-trial (and trial) period.

Strategies of technology involvement

The focus on presenting the case to jury in a manageable way also drives the significant use of technology in the insider dealing courtroom, and this is utilised by both sides of the lawyer-partisans. The use of technology in the courtroom (see Livermore, 1992) is therefore an important strategy that facilitates the successful management of the insider dealing trial, directly related to addressing the levels of understanding by the jury. Technology is used extensively in three distinct ways: as evidence, as a vehicle to present the case background, and as a vehicle to present the evidence.

First, technology appears as evidence since in insider dealing trials the evidence of improper trading is gathered through mining extensive amounts of data on transactions in the stock market, collected by the Zen technology system at the FCA. The mining of data has led to the detection of some of the more complex insider dealing cases (*R v Sanders*, interview data). Further, to establish the link between the insider and the dealer, the FCA relies on wire-tapping and conversations, or on interrogating e-mails and correspondence.

Second, technology is used to present the case background, and this is a particularly helpful way of explaining to the jury the types of business interactions that underpin the case. These presentations concern issues beyond the specific trades and charges, and are not directly related to presenting evidence. For example, in one of the trials, power points with dynamic charts were used to explain spread-betting, the activity in which confidential information was used to make profits.

Finally, technology was used in the courtroom as means to present the evidence itself. This is in line with Section 6.vi of the Protocol which indicates that the use of electronic presentation of evidence can save huge amounts of resources, and should be encouraged as good practice. In the trials, interactive power point slides, video presentations of movements of stocks, and dynamic charts were used to show the movement of different stock lines through time and through points of trading (before and after the receipt of the confidential information). These charts represented useful visual aids to the oral presentation by the prosecuting barristers. The FCA therefore extensively uses electronic presentation of the evidence, and these were considered “beautifully presented cases” (Judge#01).

The ways in which technology is used to present the background commercial activities and to present the evidence is guided by considerations of making the case and the evidence more accessible to the jury. To this end, the use of technology assistance in the trials is endorsed by both sides to the process, as a proper jury understanding of the underlining commercial issues is decisive for (non-)guilty verdicts:

Barrister#01: You gotta think ahead, it's almost like teaching methods, what is going to help the jury actually understand this? You strip that right down to core documents, the chronology is vital, because that shows the pattern and the pattern is everything. You only have the core documents, secondary documents you show on the screen. We worked very hard to reduce the amount of papers to an absolute minimum. [The defence] can have input and add things if they want to.

The informants believed that this collective focus on constructing an accessible presentation of the case and the evidence leads to jury understanding of the insider dealing mechanics – relevant for achieving both justice and efficiency. This is an important finding in light of the longstanding debates on whether the jury should be abolished altogether from the decision-making on guilt in serious fraud trials (Levi, 1993a; Lloyd-Bostock, 2007; Julian, 2008). The arguments put forward are commonly couched around the inability of lay jurors to understand complex business transactions, thus endangering the procedural efficiency of the trial. However, Lloyd-Bostock's (2007) research with the jurors of the collapsed Jubilee line case found that the jurors were still able to recall the technical aspects and business activities of the case even months after the trial. This raised questions of whether the focus of the problem should be shifted instead to prosecutorial deficiencies in adequately presenting the case and in oral advocacy (Levi, 1993a; Wooler, 2006). The insights

from the present study seem to support these arguments: the ‘beautiful’, interactive and effective visual presentation of the relevant business activities and the evidence on trading as a prosecutorial (and defence) strategy seem to have aided jury understanding. Throughout the observations, I did not encounter an incident in which jurors asked for further clarifications on points of fact.

For this reason perhaps, in the present study, the participants commonly had favourable views of the jury’s involvement and there were no significant perceptions that the jury “did not understand”. Across the range of different informants, there was no support for the abolition of the jury in complex fraud trials. These perceptions might be connected to the ability of the FCA to employ both technological and adequate human resources into arguing its case, but also to the collective engagement in ensuring its most effective presentation: by the active judge in the control of the timetabling and schedule of the evidence presentation, and by the prosecution and defence teams in charting electronic presentations of the business setting and the evidence.

Strategies due to resource availability

The final set of factors connected to achieving procedural efficiency in complex fraud trials is connected to the resources of the prosecuting agency and the defence teams. These concern the level of sophistication, expertise and available financial resources.

There was an overarching perception amongst the various informants that the FCA is a quite sophisticated and expert prosecutor. There are several reasons for such a view. First, the FCA has only the remit (and the will) to prosecute misconduct in the financial markets – the industry that it regulates, supervises, and has an expert

knowledge on. It therefore has a quite specialised remit of tackling complex fraud which is commonly unavailable to other prosecutors (e.g. the Serious Fraud Office) that are entrusted with the control of a variety of frauds across various industries.

A further advantage, much along the lines of the Roskill Report (1986) on the review of serious fraud trials, is that the investigative and prosecuting functions are combined within a single body. Market abuse cases are investigated internally by the Authority's own staff, and the decision to prosecute is also undertaken internally. This enables the case to be streamlined but also to be challenged on its strengths throughout various stages of decision-making, ranging from the investigating team, the legal department of the agency (including criminal litigators), and finally through the review of the FCA's internal Regulatory Decisions Committee (RDC) that challenges the strength of the prosecution by employing the Code for Crown Prosecutors. Ultimately this contributes to evidentially solid cases to be promoted forward to the criminal trial. Finally, the FCA has at its disposal significant resources that it invests on the pre-trial and trial process. For example, a criminal case costs the FCA £180-289.000 on average (FCA, 2016).

I state above that the level of sophistication, expertise and available resources by the defence team fosters a cooperative culture through which procedural efficiency can be achieved. These facets are also important for protecting the interests of the defendant in light of the extensive prosecution disclosure and demands for defence disclosure. The ability of the defence to respond is facilitated by the early instruction and involvement of solicitors and barristers with adequate resources to comb through the materials and to provide defence statements that protect their client's interest in a relatively short turnover period (Barrister#04). The defence is further aided by

defendants who are commonly cooperative and actively involved in the defence preparation (Solicitors#01, #03 and #04) (unlike the struggles in ‘common crime’ defence [Edwards, 2010]).

These resources therefore provide protection for the defendant’s position at the trial, and are currently threatened by the neo-liberal UK governmental movements to reducing costs in the criminal justice system by cutting state-funded legal representation (Legal Aid). This is a poignant example of “stripping justice back to its bare bones” (Ward, 2013: 342) due to concerns with performance and cost-effective targets. Though the Legal Aid cuts would principally affect marginalised defendants, the present research shows that well-off defendants prosecuted and tried in serious fraud cases are equally affected, albeit for a different reason. In some cases, defendants needed to rely on legal aid since their assets were largely frozen due to a Proceeds of Crime Act (POCA) 2002 global restraint order application by the FCA to enable the confiscation of any criminally-gained assets.

Global restraint orders were seen as “type of a maximum penalty” since they immobilised the use of any private assets by the defendant (Solicitor#01). Defendants contest these by submitting a ring-fencing request that could potentially mean that some funds are still available for defence purposes. However, because this is not always possible, the only available representation might be through public legal aid; yet niche defence barristers and solicitors do not put themselves forward in such cases:

Barrister#04: I represented [defendant] in the investigation but not to trial because he decided to fund his representation through Legal Aid. I ceased to act for him, I now don’t do Legal Aid cases. [Also] what you’d need is boutique specialist criminal law advice provided by a

handful of firms. But invariably those firms are moving away from Legal Aid.

In view of the importance of having experienced counsel in complex cases and trials that impose significant pre-trial demands on the defence, the effects of governmental cuts in Legal Aid are exacerbated in the sphere of serious economic crimes since adequate representation is difficult to find. This leaves defendants in such trials on an unequal footing with the privately-funded and resourceful prosecuting authority.¹⁰

Conclusion

In the present study I have empirically examined the implementation of the Criminal Procedure Rules and the Protocol on case management in insider dealing and market manipulation trials, finding that managerialist practices have expanded in the complex fraud trial. The findings provide support for the view that complex fraud trials can be managed with procedural efficacy, efficient spending of resources and jury understanding. Although dangers to procedural efficiency are constantly present throughout the trial, its successful management depends on a combination of factors vested in the actors involved and in the strategies used. This concerns judicial activism and leadership; the cultural shifts towards cooperation between the prosecution and the defence, and towards thinking through a defence lens by prosecutors in disclosure; the use of technology in the courtroom, and the available resources (sophisticated lawyers on both sides of the process, expertise and funding). Adjunct factors, such as organisational court cultures ('the three months trial policy') and supportive senior judiciary attitudes facilitate and strengthen effective trial management and the practical implementation of the CrimPR.

¹⁰ The Court of Appeal has confirmed that the need to rely on public legal defence, at a lesser quality than a QC level, cannot be considered a threat to a fair trial (*R v Crawley & Ors* [2014] EWCA Crim 1028). The defence contacted 70 law firms to represent the defendants at trial without success.

There are potentially positive aspects of managerialism (Cheliotis, 2006) in the context of the serious fraud trial that should not be ignored. For example, the activism by the trial judge crucially consists of pruning the extent of the indictment, an increasing oversight of timetabling and guiding the presentation of the evidence considered necessary for the jury to make a decision on issues of (dis)honesty and guilt. The requirements of prosecution disclosure can also significantly support the defence position through providing otherwise inaccessible materials due to refusal of access by previous corporate employers of the defendant, and the lack of statutory powers or resources for investigation (Owusu-Bempah, 2013).

However, a caveat should be stated that the effectiveness of these practices may still depend on the type of the offence, the extent of the judge's specialisation and on who the prosecutor is. There is a variety of white-collar offences that are more complicated than insider dealing (e.g. complex tax evasion, 'carousel' frauds, MTIC frauds), and it may be more challenging to present these complex business dealings, despite the aid of technology. Also, in other courts there might be fewer opportunities for judges to specialise in the trial of serious fraud, and this might preclude judicial activism around the proper scope of the indictment or of the evidence presentation schedule. Finally, prosecutors with fewer resources may not be able to devise strategies as sophisticated as those of the FCA in disclosure and case presentation.

The expansion of managerialist practices inevitably raises questions concerning their effects upon the postulates of adversarialism (McEwan, 2011). This study finds that managerialist thinking curtails adversarialism in some respects and co-exists with it in others. The judicial activism around the indictment and the presentation of evidence diminishes the "lawyer-partisans responsibility for selecting...and presenting the

evidence” (Langbein, 2003: 2) with significant control now wrested in the managerial judge. Defence disclosure is as problematic in complex fraud cases as in ‘common crime’ (Garland & McEwan, 2012) since it may put the defendant onto an unequal footing. However, the defendant’s exposure may be mitigated by employing sophisticated defence lawyers with access to adequate resources and client instructions to disclose informative yet protective defence statements. For this reason, the position of the defendant is significantly weakened when he/she needs to resort to state-funded legal aid. Though the defendants in serious fraud trials are commonly wealthy, they are also commonly subjected to freezing of assets orders that prevent instructing top counsel. In this sense, though not directly connected to the CrimPR, neoliberal and new management movements towards savings costs in the criminal justice system (Feinberg, 2005; Ward, 2013) may threaten the procedural position of defendants in complex fraud trials.

In other respects, managerialist practices and adversarial protections co-exist in the complex fraud trial. The crime control function of the prosecution can on some occasions be aided by the initial disclosure, the tight timetabling and the pruning of the indictment by the activist judge. Further, though at first glance it might appear that adversarial practices are eroded in the case management process, the empirical insights reveal that, against the background of cooperation and managerial pressures towards efficiency, adversarial tactics are still very much alive and pursued by both sides in the pre-trial period. The conflicts concern tensions over the extent of disclosure, with the prosecution avoiding requests for unused materials by disclosing classes of documents, and the defence submitting Section 8 CPIA 1996 applications, requesting orders for further disclosure. Conflicts can also arise over legal arguments

advanced in the defence disclosure such as, for example, the discharging of the burden of proof, and the extent of presentation of evidence.

Any arguments on adversarialism at the expense of managerialism (McEwan, 2011) should take into consideration these insights and the potential of co-existence and tensions between the two values that might be attached to trials of particular types of offences. Therefore I agree with Ashworth and Redmayne (2010) that the impact of managerialism must be understood in individual cases as opposed to an ideal conceptualisation of adversarialism. With these caveats in mind, I submit that certain managerial practices have positive effects upon the procedural efficiency of the trial of complex fraud, indicating that managerialism may not necessarily be entirely undesirable in the criminal justice system.

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